No. 20-___

IN THE

Supreme Court of the United States

DED RRANXBURGAJ,
Petitioner

v.

DAVID P. PEKOSKE, ACTING U.S. SECRETARY OF HOMELAND SECURITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

8 U.S.C. § 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." The question presented, on which the courts of appeal are divided, is:

Do legal determinations antecedent to agencies' discretionary decisions to commence proceedings, adjudicate cases, or execute removal orders "arise from" these decisions for purposes of 8 U.S.C. § 1252(g)?

PARTIES TO THE PROCEEDINGS

Petitioner is Ded Rranxburgaj. Respondents are Acting Secretary David P. Pekoske, United States Department of Homeland Security, Robert M. Wilkinson, Acting Attorney General of the United States, Rebecca Adducci, Detroit Field Office Director, Office of Detention and Removal Operations, and Thomas D. Homan, United States Immigration and Customs Enforcement.

RELATED PROCEEDINGS

Petitioner is not aware of any related proceedings.

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The opinion of the U.S. Court of Appeals for the Sixth Circuit (App., *infra*, 1a-11a) is available at 825 F. App'x 278 (6th Cir. 2020).

The U.S. District Court for the Eastern District of Michigan's opinion and order (App., *infra*, 12a-20a) is unreported and is available at 2019 U.S. Dist. LEXIS 155433 (E.D. Mich. Sept. 12, 2019).

JURISDICTION

The Sixth Circuit Court of Appeals issued its judgment on August 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(g) states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INTRODUCTION

8 U.S.C. § 1252(g) bars judicial review of claims "arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." More than twenty years ago, in *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), this Court underscored that the provision was "narrow" and "directed against [the] particular evil" of imposing judicial constraints on the three enumerated categories, which it likened to exercises of prosecutorial discretion. 525 U.S. 471, 485 n.9, 487 (1999). But *AADC* did not address what types of claims can properly be deemed to "arise from" the three kinds of decisions or actions identified in the statute.

In the decades since *AADC*, the circuit courts have come to "disagree about how to interpret § 1252(g) . . . [and] there is no prevailing interpretation of the statute." Matthew Miyamoto, Comment, *Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655, 1672 (2019). In particular, these courts have split on whether § 1252(g) insulates from judicial review challenges to legal determinations that are antecedent to an agency's decision to "[1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders." 8 U.S.C. § 1252(g). Some circuits hold that challenges to such antecedent determinations "arise from" the enumerated categories because they are "directly connected" to them. *E.g.*, *Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017). Others have held that § 1252(g) does

not bar challenges that raise "purely legal question[s]" that "form[] the backdrop against which the Attorney General later will exercise discretionary authority." *E.g.*, *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc).

In the pending case, to the detriment of petitioner Ded Rranxburgaj, the Sixth Circuit sided with the courts that have read "arising from" broadly. Mr. Rranxburgaj is an immigrant subject to an order of removal who "has raised his children here, legally worked and paid taxes, and committed no crime." App., *infra*, 11a. He sought a stay of removal so that he could remain with his wife, who is incapacitated by multiple sclerosis. *Id.* at 3a. After Immigration and Customs Enforcement (ICE) failed to respond to his stay application, Mr. Rranxburgaj took shelter with his wife in a church, *id.*, and missed his scheduled check-in with ICE for the first time in ten years. ICE immediately designated Mr. Rranxburgaj a "fugitive." *Id.* On that categorical basis alone, ICE chose to dismiss his stay application as "moot" rather than use its discretion to evaluate his application. *Id.* at 3a, 15a.

Because Mr. Rranxburgaj does not meet the legal standard for a "fugitive" established by federal case law, he brought suit challenging this designation. His challenge was not to ICE's decision to execute his removal, but rather to the legal error it committed in designating him a fugitive. Nevertheless, the Sixth Circuit read § 1252(g) broadly to bar jurisdiction over his claim, rejecting the narrower approach taken by the Ninth Circuit as "contrary to our precedent." App., *infra*, 9a n.4.

Certiorari is warranted to address the existing circuit split and to resolve it in favor of the narrower

reading of § 1252(g). The approach taken by the Sixth Circuit reads "arising from" in tension with its plain meaning, ignores the long-established presumption in favor of judicial review, and encourages executive overreach. It gives ICE *carte blanche* to ignore federal common law, remove noncitizens in violation of court-ordered stays, and commit all kinds of other legal violations as long as it can claim some connection between its actions and the three enumerated categories. Certiorari should be granted because Mr. Rranxburgaj's case is an ideal vehicle for resolving an issue that has created an ever-deepening circuit split over the past two decades.

STATEMENT OF THE CASE

I. Legal Framework

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). That statute revised the judicial review scheme in the Immigration and Nationality Act (INA). Among other changes, Congress added 8 U.S.C. § 1252(g), titled "Exclusive jurisdiction." The provision states that, "[e]xcept as provided" elsewhere in § 1252, courts lack jurisdiction over "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" in immigration proceedings. 8 U.S.C. § 1252(g).

Before IIRIRA's enactment, a group of noncitizens had challenged the government's decision to commence removal proceedings against them. *AADC*, 525 U.S. at 473. Upon the statute's passage—which

made only subsection (g) of § 1252 applicable to pending cases—the government argued that § 1252(g) stripped the federal courts of jurisdiction to hear the case. *Id.* at 480-82. More generally, the United States maintained that, unless jurisdiction was expressly provided for elsewhere in § 1252, subsection (g) operated as "a sort of 'zipper' clause" to bar judicial review of any and all deportation-related issues. *Id.* at 482.

This Court disagreed with this position. Writing for the Court, Justice Scalia rejected the broad interpretation urged by the government, favoring instead a "narrow reading" of § 1252(g). *Id.* at 487. The Court concluded that the provision "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Id.* at 482 (quoting § 1252(g)) (emphasis added in original). Each of these three categories invoked the discretionary power of the Attorney General to withhold action, such as to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Id.* at 484 (internal quotations omitted).

The Court explained that § 1252(g) was "directed against a particular evil" and specifically "attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9. Because the case involved a selective prosecution claim that squarely attacked the Attorney General's decision to commence proceedings, the Court held that respondents' claim was unreviewable. *Id.* at 487. The Court acknowledged that this narrow reading might make the provision "redundant" with other aspects of § 1252, but concluded that the subsection's

application to pending cases "alone justifies its existence." *Id.* at 483.

Since *AADC*, courts of appeal have divided over the types of claims that "arise from" the three categories of agency action articulated in § 1252(g). *See infra* at 11-15. To date, however, this Court has not addressed the division. In the years since *AADC*, it has considered the scope of § 1252(g) directly only once (and briefly).[1] In *Department of Homeland Security v. Regents of the University of California*, this Court devoted four sentences to whether § 1252(g) barred it from reviewing an Administrative Procedure Act (APA) challenge to the rescission of a deferred action from deportation program. 140 S. Ct. 1891, 1907 (2020). Reiterating that § 1252(g) is "narrow," the Court concluded that "[t]he rescission, which revokes a deferred action program with associated benefits, is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." *Id. Regents* did not engage with the broader confusion plaguing the lower courts over the scope of § 1252(g).

II. Factual History

Mr. Rranxburgaj, his wife, and their young son came to the United States from Albania in 2001. App., *infra*, 2a. The family unsuccessfully sought asylum

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[1] In the interim, as part of the REAL ID Act of 2005, Congress amended § 1252(g) to clarify that this provision also precluded jurisdiction over habeas claims that fell within its scope. *See* Pub. L. 109-13, § 106(a)(3), 119 Stat. 231, 311 (2005). Because Mr. Rranxburgaj does not bring a habeas claim, the REAL ID Act has no bearing on his case.

and became subject in 2009 to a final order of removal. *Id.* at 2a, 5a-6a.

In the interim, in 2007, Mr. Rranxburgaj's wife was diagnosed with multiple sclerosis, a progressive and incurable disease that attacks the central nervous system. App., *infra*, 2a-3a. Three years later, and one year after their removal order became final, ICE agreed to let the couple remain in the United States and placed them under an order of supervision. *Id.* at 2a, 15a. Their son similarly was permitted to remain. *Id.* at 15a. A second son, born several years before Mrs. Rranxburgaj's diagnosis, has U.S. citizenship.

In the years that followed, Mr. Rranxburgaj abided by all conditions of the order of supervision. App., *infra*, 14a. He "raised his children here, legally worked and paid taxes, and committed no crime." *Id.* at 11a. He also "demonstrated admirable devotion to his wife as she fights a terrible illness." *Id.* Because of how much his wife's multiple sclerosis had progressed, she was "entirely dependent" on Mr. Rranxburgaj "for everything, including the most basic needs." *Id.* at 3a (quotation marks omitted).

In October of 2017, after nearly a decade of Mr. Rranxburgaj's full compliance with his order of supervision, an ICE agent told him to leave the country by the end of January 2018. *See* App., *infra*, 2a; *cf.* Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interests* (Feb. 20, 2017) (providing that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement").[2]

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[2] DHS recently rescinded this enforcement policy. *See* Dep't of Homeland Sec., *Review of and Interim Revision to Civil*

Mr. Rranxburgaj's wife was not ordered to leave with him because her multiple sclerosis prevents her from traveling. App., *infra*, 14a. Consistent with the agent's instruction, Mr. Rranxburgaj purchased a plane ticket to Albania for a flight departing on January 25. *Id.* at 2a. He presented this itinerary at his November ICE check-in. *Id.*

On December 8, 2017, Mr. Rranxburgaj applied for a one-year stay of removal. App., *infra*, 2a-3a, 22a. Pursuant to 8 C.F.R. § 241.6, an ICE district director may grant such a stay "in his or her discretion and in consideration of factors listed in 8 C.F.R. § 212.5 and section 241(c)" of the INA. 8 C.F.R. § 241.6. The factors reference characteristics like the urgency of humanitarian interests and the propriety of removal. *See* 8 C.F.R. § 212.5(b); 8 U.S.C. § 1231(c)(2)(A). The stay regulation further provides that "[n]either the request nor failure to receive notice of disposition of the request shall . . . relieve the alien from strict compliance with any outstanding notice to surrender" for removal. 8 C.F.R. § 241.6.

Mr. Rranxburgaj's stay application explained that he needed to remain in the country to continue caring for his wife. App., *infra*, 3a, 21a. He emphasized that his deportation would be "a death sentence" for her because she cannot care for herself. *Id.* at 3a. The application included medical records evidencing his wife's declining health; tax returns for the past thirteen years; and more than eighty personal letters of support attesting to Mr. Rranxburgaj's critical role in tending to his wife and to her dependency on him. *Id.*

Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021).

"Weeks passed, but ICE did not act on [Mr.] Rranxburgaj's application." App., *infra*, 3a. On January 9, 2018, Mr. Rranxburgaj attended another check-in. *Id.* at 22a. A final check-in was scheduled for January 17. *Id.* at 14a. The day before that check-in, the Rranxburgaj family openly took sanctuary in their Detroit church. *Id.* at 3a, 14a.

As a result, Mr. Rranxburgaj did not attend his scheduled January 17 ICE check-in. App., *infra*, 3a, 14a. With full knowledge of his whereabouts and without ever having ordered Mr. Rranxburgaj to surrender for removal, ICE dismissed Mr. Rranxburgaj's stay application as "moot" on that same day, stating that his "willful failure" to attend the meeting had made him a "fugitive." *Id.* at 14a, 22a. Mr. Rranxburgaj moved for reconsideration, pointing to an extensive body of case law holding that fugitive status does not attach where the person in question misses an appointment but remains in the jurisdiction and keeps ICE informed of his whereabouts. *Id.* at 3a, 14a. ICE denied Mr. Rranxburgaj's multiple requests for reconsideration. *Id.* at 3a.

III. Procedural History

In June of 2018, Mr. Rranxburgaj filed a complaint in the U.S. District Court for the Eastern District of Michigan. App., *infra*, 4a. He asserted that ICE violated the APA when it incorrectly applied the fugitive disentitlement doctrine to dismiss his stay application as moot. *Id.* at 4a, 16a. Mr. Rranxburgaj asked the trial court to set aside ICE's application of the fugitive disentitlement doctrine, clearing the path

for the agency to adjudicate his stay application on the merits. *Id.* at 16a.

The defendants sought dismissal, claiming that § 1252(g) prohibited judicial review of Mr. Rranxburgaj's claim. App., *infra*, 17a. The district court held that it lacked subject matter jurisdiction, prompting Mr. Rranxburgaj to appeal.[3] *Id.* at 19a.

The Sixth Circuit acknowledged this Court's admonition in *AADC* that § 1252(g) should be interpreted narrowly. App., *infra*, 6a. Nevertheless, the court held that it had no jurisdiction to hear Mr. Rranxburgaj's claims. *Id.* at 9a. In its view, Mr. "Rranxburgaj's challenge . . . goes directly to ICE's decision to execute an order of removal." *Id.* at 10a. Concluding that § 1252(g) stripped the federal courts of jurisdiction—even over legal issues antecedent to the agency's exercise of discretion—the Sixth Circuit did not address whether ICE had the legal authority to invoke the fugitive disentitlement doctrine with respect to Mr. Rranxburgaj. *Id.* at 11a. In finding no jurisdiction, it rejected Mr. Rranxburgaj's invocation of § 1252(g) case law from another circuit as "unpersuasive" and "contrary to our precedent." *Id.* at 9a n.4.

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[3] In dismissing the case for lack of subject matter jurisdiction, the district court relied not on § 1252(g), but rather on two other subsections of § 1252. App., *infra*, 19a. On appeal, the parties "agree[d] that the district court was mistaken" in relying on these provisions and the Sixth Circuit held that Mr. Rranxburgaj's claims did "not fall within [their] ambit." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeal Are Deeply Divided Over Whether § 1252(g) Prohibits Judicial Review of Legal Determinations Antecedent to an Agency's Exercise of Discretion

This Court has repeatedly emphasized the narrow scope of § 1252(g), but it has never analyzed what types of claims "arise from" the three categories of agency action listed in the provision. In the years since *AADC*, the courts of appeal have split over this issue—sometimes cleanly, at other times, fractured opinions from the circuits emerge. At least two circuits have concluded that only claims challenging an agency's discretionary authority can be said to "arise from" one of the three enumerated actions in § 1252(g). By contrast, at least two other circuits—now joined by the Sixth Circuit—have employed an expansive construction of "arising from," sweeping within the ambit of § 1252(g) not only challenges to an agency's discretionary authority but also challenges to the agency's antecedent legal determinations. Several circuits have mixed case law on this issue. In short, the "circuit courts disagree about how to interpret § 1252(g) . . . [and] there is no prevailing interpretation of the statute." Matthew Miyamoto, Comment, *Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655, 1672 (2019).

The Seventh and Ninth Circuits have interpreted the statutory phrase "arising from" to encompass only challenges to discretionary decisions made pursuant

to uncontested authority. These circuits have deemed claims that challenge antecedent legal determinations to fall outside § 1252(g)'s reach.

In *Fornalik v. Perryman*, the Seventh Circuit held that § 1252(g) did not bar review of an agency's denial of an adjustment of status application, which the noncitizen in question claimed was "incorrect as a matter of law." 223 F.3d 523, 531-32 (7th Cir. 2000). The court observed that, although the noncitizen "obviously want[ed] this court to stop the execution of a removal order, that fact [came] into the case only incidentally." *Id.* at 532. It went on to state that "[h]is claim is not that the Attorney General is unfairly executing a removal order, but rather that a prior, unrelated error makes his removal improper." *Id.*

The Ninth Circuit has consistently applied this reading of § 1252(g), including twice *en banc*. *See Cath. Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (finding § 1252(g) applies only to discretionary decisions); *Hovsepian*, 359 F.3d at 1155 (same). For example, in *Barahona-Gomez v. Reno*, noncitizens sought a stay of removal to allow them to pursue their challenge to an agency directive that "order[ed] a halt to the issuance of decisions granting suspension of deportation . . . until further notice." 236 F.3d 1115, 1117 (9th Cir. 2001). Although the challenge could have been framed as one that arose from the "decision or action" to "adjudicate cases," the court held that § 1252(g) did not apply because the noncitizens' challenge was not directed at an exercise of agency discretion. *Id.* at 1118, 1120. Rather, their claims challenged a violation of an agency's "mandatory duties." *Id.* As another more recent example, the Ninth Circuit held in *Arce v. United States* that § 1252(g) did not preclude

jurisdiction to review a claim arguing that removal had been executed unlawfully in violation of a court-ordered stay. 899 F.3d 796, 800-01 (9th Cir. 2018) (citing, among other cases, *Hovsepian*, 359 F.3d at 1155).

In contrast, the Fifth and Eighth Circuits have read the "arising from" language in § 1252(g) far more broadly. These courts have defined "arising from" as "connected directly and immediately" to one of the three enumerated actions in the statute. *Silva*, 866 F.3d at 940 (quoting *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999)). As a result, they typically treat claims challenging an agency's antecedent legal authority as falling within the scope of § 1252(g). Both circuits have therefore held—in direct conflict with the Ninth Circuit—that they lack jurisdiction to review noncitizens' claims that removal was wrongly executed in violation of court-ordered stays. *Silva*, 886 F.3d at 940; *Foster v. Townsley*, 243 F.3d 210, 214-15 (5th Cir. 2001).[4]

Cases from other circuit courts similarly demonstrate the existence of widespread confusion over the scope of § 1252(g). The Third Circuit, for example, has held that § 1252(g) does not bar challenges to antecedent legal issues based on the

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[4] An unpublished opinion from the Tenth Circuit reaches a similar interpretation of § 1252(g). In *Namgyal Tsering v. U.S. Immigration & Customs Enforcement*, the court considered an immigrant's claim that ICE lacked legal authority to use false documents in effectuating his removal. 403 F. App'x 339, 341 (10th Cir. 2010). The court held that § 1252(g) barred review, concluding that § 1252(g) does not "appl[y] only to review of discretionary decisions by the Attorney General in these [three] areas," but also "to review of non-discretionary decisions." *Id.* (quoting *Foster*, 243 F.3d at 214).

INA—such as a claim that the agency lacks power under the statute of limitations to commence proceedings—but does bar challenges based on the Constitution or the APA. *Garcia v. Att'y Gen.*, 553 F.3d 724, 729 (3d Cir. 2009); *Tazu v. Att'y Gen.*, 975 F.3d 292, 298 (3d Cir. 2020).[5]

The Sixth Circuit's approach to § 1252(g)'s "arising from" language aligns with the Fifth and Eighth Circuits. The Sixth Circuit concluded that any claim related to a stay of execution would be one "arising from" ICE's decision to execute removal—regardless of whether the claim challenged the agency's exercise of its discretion or instead an antecedent legal determination made by it. App., *infra*, 11a ("[W]e discern no principled difference between the denial of an application for a stay of removal on the merits and a denial on procedural grounds."). The Sixth Circuit viewed some of the Ninth Circuit precedents described above as "unpersuasive," "distinguishable,"

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[5] A fractured approach to § 1252(g) also occurs in the case law of the Eleventh Circuit, which has cases pointing in different directions on the interpretation of "arising from." *Compare, e.g.*, *Gupta v. McGahey*, 709. F.3d 1062, 1064 (11th Cir. 2013) (holding that § 1252(g) bars review of allegations of mistreatment related to the commencement of proceedings because "[s]ecuring an alien while awaiting a removal determination constitutes an action taken to commence proceedings"), *with Madu v. Att'y General*, 470 F.3d 1362, 1368 (11th Cir. 2006) (concluding that while § 1252(g) "bars courts from reviewing certain exercises of discretion . . . it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions"), *and Canal A Media Holding, LLC v. U.S. Citizenship & Immigr. Servs.*, 964 F.3d 1250, 1255 (11th Cir. 2020) (holding, in concluding that § 1252(g) did not bar review, that a court must "focus on the action being challenged" rather than on whether it has "practical effect[s]" for one of the three challenged categories).

or "contrary to our precedent." *Id.* at 9a n.4, 10a-11a (describing *Arce*, 899 F.3d 796, as involving a different factual situation and rejecting the approach taken in *Hovsepian*, 359 F.3d at 1144). In so doing, the Sixth Circuit construed § 1252(g) far too broadly.

II. The Sixth Circuit Erred in Its Broad Reading of § 1252(g), Which Only Bars Review of Claims "Arising From" Certain Discretionary Agency Decisions

The plain meaning of "arising from," the well-settled presumption in favor of judicial review, and this Court's prior cases involving § 1252(g) require that it be read narrowly. Yet the government has persuaded several circuits to take a broad view of claims said to "arise from" certain agency actions. The result is: important legal determinations by executive agencies are now shielded from federal court review, as long as the claims challenging them are connected—somehow—to the commencement of proceedings, adjudication of cases, or execution of removal. Mr. Rranxburgaj's case illustrates the problematic nature of this approach. To correct it, granting certiorari here is warranted.

A. Core Canons of Statutory Construction Require a Narrow Reading of "Arising From"

This Court has repeatedly emphasized that § 1252(g) is narrow. *AADC*, 525 U.S. at 487; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion). Indeed, this Court's precedents have instructed that § 1252(g) "applies *only* to [the]

three discrete" discretionary decisions or actions to which it is limited: the commencement of proceedings, the adjudication of cases, and the execution of removal orders. *AADC*, 525 U.S. at 482 (emphasis added); *see also Jennings*, 138 S. Ct. at 841. This approach accords with the "well-settled" and "strong presumption" in favor of judicial review of administrative action. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991). This presumption has been "consistently applied" to immigration statutes, including, most recently, during this Court's last term. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (internal citation omitted).

The Court's admonitions for a narrow construction of § 1252(g) and the strong presumption in favor of judicial review offer important implications for the textual requirement that claims "arise from" an agency's discretionary decision to initiate action with respect to one of the provision's three categories. This textual requirement sets independent limits on the reach of § 1252(g).

"Arising from" requires more than just a connection between the claims and the discretionary agency decision or action; rather, the claims must *originate* from that decision or action. *See* Webster's Third New International Dictionary 117 (1961) (defining "arise" as "originate from a specified source"). That is, the discretionary decision or action must be the heart of the claim—it is not enough for one to be merely linked to the other. Moreover, it bears emphasizing that it is the legal *claims*, not the challenged action motivating the suit, that must "arise from" the agency action to execute removal (or commence proceedings or adjudicate cases). 8 U.S.C.

§ 1252(g); *see also Fornalik*, 223 F.3d at 531-32 (observing that, analogous to the statute giving rise to federal question jurisdiction, "§ 1252(g) is applicable only where the alien's well-pleaded complaint is based on one of [the] three listed factors"). Read with the strong presumption in favor of judicial review, the limiting power of this language is even more compelling.

Notably, a plurality of this Court recently held that the phrase "arising from" in a neighboring provision to § 1252(g) must be narrowly interpreted and excludes pure questions of law that are not integral to the actions named in that provision. *Jennings*, 138 S. Ct. at 840-41 (2018). *Jennings* considered the scope of 8 U.S.C. § 1252(b)(9), which provides that judicial review of all claims "arising from any action taken . . . to remove an alien from the United States . . . shall be available only in judicial review of a final order [of removal]." The Court held that this provision did not strip the federal courts of jurisdiction over a challenge to long-lasting detention pending removal. *Jennings*, 138 S. Ct. at 840; *see also id.* at 876 (Breyer, J. dissenting) (reaching the same result). Writing for the plurality, Justice Alito accepted that the detention amounted to "action[s] taken to remove [plaintiffs] from the United States." *Id.* at 840. But he nonetheless concluded that the "questions of law" raised by the plaintiffs in challenging their detention did not "arise from" these actions. *Id.* "The question is not whether *detention* is an action taken to remove an alien, but whether *the legal questions* in this case arise from such an action." *Id.* at 841 n.3. Justice Alito explained that "th[e] legal questions [in the case] are too remote from the actions

taken to fall within the scope" of the statutory provision. *Id.*

Similar reasoning underlies the approach of those circuits that have interpreted § 1252(g) not to prohibit judicial review of challenges to an agency's legal determinations that are antecedent to exercises of discretion with respect to the provision's three enumerated categories. Unlike challenges to discretionary actions, challenges to antecedent legal determinations are typically one or more steps removed from the commencement of proceedings, adjudication of cases, or execution of removal orders. Put differently, challenging the wisdom of ordering chicken over steak is a step removed from a challenge to the person's ability to order anything in the first place. A claim that an agency has established an unlawful policy of suspending deportations or violated a court-ordered stay may be said to be "connected to" the three enumerated decisions or actions, but such claims do not "arise from" them and thus do not impede ordinary agency discretion.

In fact, the agency's *own regulations* recognize a place for federal court jurisdiction over certain claims that prevent the execution of removal. 8 C.F.R. § 241.3 provides that the "filing of . . . a petition or action in a Federal court seeking review of the . . . execution of an order of removal shall not delay execution of the Warrant of Removal except upon an affirmative order of the court." This regulation is reconcilable with § 1252(g) only if there is a category of claims that can address the execution of removal yet not "arise from" it; otherwise, there would be no basis upon which a court could issue an affirmative order delaying execution of an order of removal.

By contrast, interpreting "arising from" to sweep in legal determinations antecedent to an agency's discretionary decision to commence proceedings, adjudicate cases, or execute removal orders is a result that "no sensible person could have intended." *Jennings*, 138 S. Ct. at 840 (internal quotations and citations omitted). This approach reads § 1252(g) broadly rather than narrowly. It ignores the well-settled presumption in favor of judicial review. And it goes far beyond § 1252(g)'s purpose, as recognized in *AADC*, of protecting against "attempts to impose judicial constraints upon prosecutorial discretion." 525 U.S. at 485 n.9. Indeed, under the broad reading of "arising from" now adopted by several circuits, ICE can now do what prosecutors may not: it can flout court-imposed stays of execution while evading accountability for its actions. *Silva*, 866 F.3d at 940; *Foster*, 243 F.3d at 212. Such an interpretation transforms the limited carve-out from judicial review set out by Congress into a blanket invitation for executive overreach.

B. Mr. Rranxburgaj's Claims Do Not "Arise From" ICE's Decision to Execute His Removal

Contrary to the broad reading of § 1252(g) adopted by the Sixth Circuit, Mr. Rranxburgaj's claims under the APA do not "arise from" ICE's decision to execute his removal. It is true that the decision to execute his removal was the backdrop against which his claims emerged, and his underlying objective is to remain with his severely ill wife. Yet like other challenges to an agency's antecedent legal determinations, Mr. Rranxburgaj's claim does not flow from ICE's

discretionary actions. *His challenge is not to ICE's decision to execute his removal, but rather to the legal error it committed in designating him a fugitive.* Rolling back this designation will not stop ICE from making discretionary decisions regarding the execution of his removal. What it will do is enable ICE to consider his stay application in line with the discretionary parameters laid out in 8 C.F.R. § 241.6.

The heart of Mr. Rranxburgaj's complaint is that ICE lacked the authority to designate him a fugitive.[6] There is a well-developed (though not uniform) body of case law in the federal courts about the circumstances under which ICE can apply this designation and thus trigger the fugitive disentitlement doctrine. Although the Sixth Circuit has not addressed this issue, several circuits have held as a matter of law that this doctrine cannot disentitle an immigrant from seeking relief when his whereabouts are known to authorities, as Mr. Rranxburgaj's were here. *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009); *see also Zhou v. Att'y Gen.*, 290 F. App'x 278, 281 (11th Cir. 2008); *Nnebedum v. Gonzales*, 205 F. App'x 479, 480-81 (8th Cir. 2006). And even those circuits that have held that the fugitive disentitlement doctrine can apply where an individual's whereabouts are known, none have applied it simply for a missed check-in. *Bright v. Holder*, 649 F.3d 397, 399-400 (5th Cir. 2011) (applying the doctrine where the individual failed to

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[6] ICE made clear that Mr. Rranxburgaj's stay application was moot because it deemed him a "fugitive" under the fugitive disentitlement doctrine. *See* Brief of the United States at 17, *Rranxburgaj v. Wolf*, 825 F. App'x 278 (6th Cir. 2020) (No. 19-2148) (arguing that ICE's "application of the doctrine" was justified).

comply with an order to surrender); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 729-30 (7th Cir. 2004) (same).

In designating Mr. Rranxburgaj a fugitive, ICE erroneously applied the fugitive disentitlement doctrine, deciding a legal question that the Sixth Circuit had not yet decided, and on which other circuits disagree. Mr. Rranxburgaj now seeks review of this determination. His rejected stay application has a connection to the execution of his removal, in that his ultimate goal is not to have removal executed (although, pursuant to 8 C.F.R. § 241.6, stay applications can be filed any time after a final order of removal is entered and regardless of whether ICE has decided to execute removal). But his *claim*—the legal question he raises for federal court review—does not "arise from" the execution of his removal. Indeed, the Sixth Circuit decision underscored that Mr. Rranxburgaj's stay application "did not challenge the validity of his final removal order." App, *infra*, 6a. Like claims raising a violation of a statute of limitations or disregard of a court-ordered stay, Mr. Rranxburgaj challenges an antecedent legal determination: the federal common law standard for defining a fugitive. His claim "does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *Hovsepian*, 359 F.3d at 1155.

ICE's erroneous designation of Mr. Rranxburgaj as a fugitive prevented his stay application from ever receiving review on the merits pursuant to the mandate of 8 C.F.R. § 241.6. Thus Mr. Rranxburgaj's claims, rather than "arising from" the execution of the removal order, instead contest the agency's very

authority to erroneously designate him a fugitive. ICE's regulation on stay applications—which it must follow as a matter of obligation[7]—provides that the district director may grant the stay "in his or her discretion *and* in consideration of factors listed in 8 C.F.R. § 212.5 and [8 U.S.C. § 1231(c)]," which in turn refer to factors like humanitarian considerations. 8 C.F.R. § 241.6 (emphasis added). By improperly designating Mr. Rranxburgaj a fugitive and thereby dismissing his application as "moot," ICE failed to follow its own process for reviewing stay applications, including considering any of the requisite factors regarding the adjudication of stay applications delineated in 8 C.F.R. § 241.6.

In seeking review of ICE's determination that he is a fugitive, Mr. Rranxburgaj raises an issue that comes up in many areas of immigration law. The scope of the fugitive disentitlement doctrine has been litigated in a myriad of immigration contexts, not just in connection to the commencement of proceedings, the adjudication of cases, or the execution of removal orders. *See, e.g.*, *Sun v. Mukasey*, 555 F.3d at 805 (rejecting application of the fugitive disentitlement doctrine in a case pursuing the reopening of removal proceedings); *Zhou*, 290 F. App'x at 281 (rejecting application of the fugitive disentitlement doctrine in a petition for review of the BIA's denial of an asylum

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[7] An agency's obligation to follow its own procedures is a long-standing principle of administrative law, including in the immigration context, at least where the procedures implicate individual rights. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954), *abrogated on other grounds as recognized in Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1980 (2020) (holding that the Board of Immigration Appeals lacked the discretionary authority to act in contravention of its own promulgated regulations).

application). A holding that Mr. Rranxburgaj's challenge to his fugitive status "arises from" the execution of his removal would transform a narrow limitation on judicial review into an authorization to disregard general legal rules for immigration law established by the federal courts.

III. This Case Presents an Important Question and Is the Ideal Vehicle for Addressing It

A. The Jurisdiction of the Federal Courts to Review Agency Action Is a Matter of Exceptional Importance

The Sixth Circuit's broad interpretation of § 1252(g) has significant consequences for the balance of power between federal courts and executive agencies. By bringing within the scope of § 1252(g) not only challenges to an agency's discretionary decisions but also challenges to antecedent legal determinations, the Sixth Circuit insulates a wide range of agency action from judicial review. The interpretation of § 1252(g) is therefore a question of exceptional importance, as the answer will determine the extent to which courts across the country may review allegations of executive overreach.

Judicial review provides an important "check" that maintains the separation of powers between the nation's three equal branches of government. *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 76 (2015) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 124 (2015) (Thomas, J.)). Indeed, the notion of a robust separation of powers "was not simply an abstract generalization in the minds of the Framers." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (citing *Buckley v.*

Valeo, 424 U.S. 1, 124 (1976) (per curiam)). Rather, separating powers among the three equal branches is foundationally important to the nation's system of governance. As James Madison explained in Federalist No. 47, "the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of unity . . ." The Federalist No. 47 (James Madison).

To this end, "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Garner*, 387 U.S. 136, 141 (1967) (internal citations omitted). The importance of judicial review is particularly salient in situations such as Mr. Rranxburgaj's, where agencies wield what is traditionally a judicial power: the right to make individualized determinations. This further reinforces the need to interpret jurisdiction-stripping statutes narrowly, as "we simply cannot compromise when it comes to our Government's structure." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2219 (2020) (Thomas, J., dissenting); *see also id.* at 2216 ("[Congress] cannot authorize the use of judicial power by officers acting outside of the bounds of Article III" (citation omitted)).

The "need to divide and disperse power in order to protect liberty" has long animated the Court's approach to separation of powers in the immigration context. *Chadha*, 462 U.S. at 950. The Court has thus "consistently applied" the presumption in favor of judicial review to immigration statutes, even emphasizing its importance last term in *Guerrero-*

Lasprilla. 140 S. Ct. at 1069. It therefore defies this Court's precedent to construe § 1252(g) so broadly as to wholly eliminate judicial review for challenges to an agency's very authority. Indeed, a broad reading of § 1252(g) strips federal courts of their ability to provide a "check" on executive power and authority in an area of the law that not only touches many lives but is also ripe for abuse of executive power. *DOT*, 575 U.S. at 76.

Under the broad reading of § 1252(g) adopted by several circuits, none of ICE's actions and decisions connected to the provision's three enumerated categories are reviewable—even where these actions and decisions stemmed from erroneous antecedent legal determinations, including but not limited to a misapplication of federal common law (as is the case here) or the use of falsified records (as in *Tsering*, 403 F. App'x at 341). Such a broad reading gives executive agencies too much untrammeled power. It would shield ICE from judicial oversight when it establishes an unlawful policy of suspending grants of relief from removal. It would shield ICE from judicial oversight when it violates a court-ordered stay. And, as here, it would shield ICE from judicial oversight when it erroneously makes a legal determination that belongs to the federal judiciary. A narrow reading of § 1252(g), by contrast, would properly adhere to the plain meaning of "arising from" and limit the potential for such agency abuses.

B. This Case Is an Excellent Vehicle for Determining the Scope of § 1252(g)

For several reasons, this case is an ideal vehicle to address the scope of § 1252(g). First, the case raises

the legal question cleanly, as the facts are clear and uncontested. Second, this question was fully presented and addressed below, with the Sixth Circuit concluding that even challenges to an agency's antecedent legal determinations can be said to "arise from" a discretionary decision to execute removal. Third, given that this issue has reached—and vexed—many circuit courts in the twenty-plus years since this Court last considered § 1252(g) at length, the question is ripe for consideration.

Granting this petition would allow this Court to firmly establish the distinction between challenges to an agency's discretionary decisions and challenges to its antecedent legal determinations. In doing so, the Court would ensure that judicial review is available for noncitizens who otherwise could have no remedy for many kinds of lawless agency action. The time is ripe for this Court to address this question, establish precedent for the lower courts, and allow Mr. Rranxburgaj's claim to proceed to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 22, 2021

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19-2148

DED RRANXBURGAJ, PLAINTIFF-APPELLANT

v.

CHAD WOLF[1], ET AL., DEFENDANTS-APPELLEES

Argued: August 5, 2020
Decided and Filed: August 26, 2020

On Appeal from the United States District Court for the Eastern District of Michigan
No. 18-11832—Denise Page Hood, Chief Judge.

OPINION

BEFORE: GIBBONS, GRIFFIN, AND THAPAR, CIRCUIT JUDGES.

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[1] Chad Wolf, as the acting Secretary for the Department of Homeland Security has been automatically substituted as a defendant pursuant to Federal Rule of Civil Procedure 25(d).

GRIFFIN, Circuit Judge.

Plaintiff Ded Rranxburgaj filed this suit after United States Immigration and Customs Enforcement (ICE) denied his request for a temporary stay of his removal order. He claims that ICE's decision to deny his application on procedural grounds was contrary to law. However, the district court dismissed Rranxburgaj's complaint for lack of subject-matter jurisdiction, and although our reasoning differs, we agree that the lower court lacked jurisdiction and affirm.

I.

In 2001, plaintiff Ded Rranxburgaj and his wife Flora Rranxburgaj fled their native country of Albania and sought asylum in the United States. However, their asylum application was denied, and in 2006 an Immigration Judge ordered them removed. Three years later, the Board of Immigration Appeals dismissed their appeal. But while those proceedings were ongoing, Flora developed multiple sclerosis. As a consequence, the government placed the Rranxburgajs under orders of supervision. *See* 8 C.F.R. § 241.5. Thus, while the government could still execute their removal orders at any time, the Rranxburgajs were allowed to continue living in the United States.

Things changed in October 2017 when plaintiff reported for one of his regular check-ins with ICE in Detroit, Michigan. An agent with ICE told Rranxburgaj that the agency intended to remove him in January 2018 and instructed him to purchase a plane ticket. Plaintiff complied, purchasing airfare to Albania with a January 25, 2018 departure date, which he presented to ICE at a subsequent check-in on November 30, 2017. About

a week later, Rranxburgaj filed an application for a temporary stay of removal. Specifically, he requested a one-year stay of removal, citing Flora's "advanced" multiple sclerosis. He explained that Flora was "entirely dependent on [him] for everything, including the most basic needs." If he were removed, Rranxburgaj stated, it would "be a death sentence for [his] wife." The application included his wife's medical records, thirteen years' of tax returns, and more than eighty letters of support.

Weeks passed, but ICE did not act on Rranxburgaj's application. Less than three weeks before his scheduled removal, Rranxburgaj attended another check-in, and yet ICE did not address his application. Instead, the agency told him only to return for another check-in, eight days before his removal date. Rather than return for that last check-in, Rranxburgaj moved himself and his family into the Central United Methodist Church in Detroit, Michigan and claimed sanctuary. Church leaders held a press conference, and Rranxburgaj made a public statement that he was seeking sanctuary from removal to care for his wife.

The following day, ICE announced that it considered Rranxburgaj a "fugitive" based on his failure to attend the check-in as scheduled. The agency also sent a letter to Rranxburgaj's counsel, which indicated that it had denied Rranxburgaj's application for a temporary stay of removal as "moot," because his "willful failure to comply with the terms of his supervised release" rendered him a "fugitive from ICE." Rranxburgaj asked ICE to reconsider, but the agency held firm to its position

that Rranxburgaj's failure to report disentitled him from discretionary relief.

Rranxburgaj then filed suit in the United States District Court for the Eastern District of Michigan in June 2018 to "challenge the refusal" of the agency to "adjudicate on the merits his application for a stay of removal." He invoked the Administrative Procedure Act, claiming that the court had authority to compel agency action which had been "unreasonably withheld or delayed[,]" and asserted that the court should set aside the agency determination that he was a fugitive as contrary to law.[2] As relief, he asked the court to enjoin the defendants from removing him, declare the agency's actions arbitrary and capricious, and issue an injunction compelling the defendants to consider the merits of his stay application.

ICE moved to dismiss Rranxburgaj's suit for lack of subject-matter jurisdiction and for failure to state a claim. Fed. R. Civ. P. 12(b). It relied on 8 U.S.C. § 1252(g), which provides that:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any

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[2] Plaintiff also sought a writ of mandamus on the equitable theory that he had a right to a timely merits decision on his stay application. Because he does not raise any argument related to this claim in his statement of issues or the body of his brief on appeal, we deem it forfeited. *See, e.g.*, *United States v. Calvetti*, 836 F.3d 654, 664 (6th Cir. 2016).

> cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The agency reasoned that § 1252(g) applied because the action arose "from the decision to deny [plaintiff's] application for a stay, and hence execute his removal order." The district court, however, granted ICE's motion to dismiss for lack of jurisdiction on other grounds. It ruled that 8 U.S.C. § 1252(a)(2) and (a)(5) deprived it of jurisdiction because ICE's denial of Rranxburgaj's request for a stay was directly related to his final removal order. The district court then entered judgment, and Rranxburgaj timely appealed.

II.

We review de novo a district court's dismissal of a complaint for lack of subject-matter jurisdiction. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 860 (6th Cir. 2020).

At the outset, the parties appear to agree that the federal question statute, 28 U.S.C. § 1331, confers jurisdiction to federal courts to review agency action under the terms of the Administrative Procedure Act. *See, e.g.*, *Jama v. Dep't of Homeland Security*, 760 F.3d 490, 494 (6th Cir. 2014). They disagree, however, on whether § 1252(g) of the REAL ID Act of 2005 divested the district court of subject-matter jurisdiction over Rranxburgaj's claims brought under that authority.

The district court relied on two provisions of the REAL ID Act, 8 U.S.C. § 1252(a)(2) and (a)(5), to

hold that it lacked jurisdiction over Rranxburgaj's claims. However, those provisions reflect Congress's decision to "channel judicial review of an alien's claims *related to his or her final order of removal* through a petition for review at the court of appeals." *Elgharib v. Napolitano*, 600 F.3d 597, 600 (6th Cir. 2010) (emphasis added). In his complaint, Rranxburgaj did not challenge the validity of his final order of removal. He instead challenged only the agency's denial, on procedural grounds, of his application for a temporary stay of removal. That does not fall within the ambit of § 1252(a)(2) and (a)(5). *See id.* at 605. On appeal, the parties agree that the district court was mistaken to rely on § 1252(a)(2) and (a)(5). They instead focus on 8 U.S.C. § 1252(g), which further refines the subject-matter jurisdiction of the federal courts over claims arising out of administrative action in the immigration setting. More specifically, they contest whether Rranxburgaj's claims "aris[e] from the decision or action by the Attorney General to . . . execute [a] removal order[]." 8 U.S.C. § 1252(g). We hold they do and, therefore, we lack jurisdiction.

First, we acknowledge that in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (hereinafter *AADC*), the Supreme Court interpreted the operative language of § 1252(g) narrowly, reasoning that the jurisdictional bar applied only to the three "discrete actions," *id.* at 482, listed in the statute: "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders[.]" *Id.* at 483. The Court reasoned that Congress had good reason to shield these actions from judicial review because the government had increasingly begun exercising its discretion to abandon deportation and removal

actions, either for humanitarian reasons or for its own convenience. "Since no generous act goes unpunished, however, the [agency's] exercise of this discretion opened the door to litigation in instances where the [agency] chose *not* to exercise it." *Id.* at 484. Therefore, the Court reasoned that § 1252(g) "seem[ed] clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *Id.* at 485. The *AADC* Court thus concluded that the petitioners' challenge to the Attorney General's decision to "commence proceedings" against them fell squarely within § 1252(g)'s jurisdictional bar. *Id.* at 492.

A few years later, our court interpreted *AADC* in considering whether § 1252(g) prevented a district court from exercising jurisdiction over a petition for a writ of habeas corpus, challenging the decision of the Attorney General to deny a request for a temporary stay of deportation. *Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004). We held that it did. The court began with the observation that Moussa "specifically challenge[d] the Attorney General's refusal . . . to grant [him] a stay of deportation." *Id.* at 553. This, we said, was "a decision that is wholly within the discretion of the Attorney General" and as such, it was "directly part of a decision to execute a removal order." *Id.* at 554. Accordingly, we held that Moussa's attempt to "enjoin the Attorney General from executing a valid

order of deportation" was "protected from subsequent judicial review under § 1252(g)."[3] *Id.*

Our review did not end there because at the time, the Supreme Court interpreted § 1252(g) to exclude habeas petitions raising colorable constitutional or statutory claims under 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Therefore, the "final part [of] our inquiry" was whether Moussa had asserted a colorable claim under the standard announced in *St. Cyr*. *Moussa*, 389 F.3d at 554–55. In the end, we concluded that *Moussa* had not presented such a claim and affirmed the district court's judgment for lack of subject-matter jurisdiction. *Id.* at 555. Importantly, this exception to the jurisdictional bar in § 1252(g) no longer exists. "The REAL ID Act was enacted . . . in response to the Supreme Court's decision in *INS v. St. Cyr* . . . which held that under 28 U.S.C. § 2241, federal courts have jurisdiction over habeas petitions brought by aliens in custody pursuant to a deportation order." *Almuhtaseb v. Gonzales*, 453

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[3] On this point, *Moussa* appears consistent with every other circuit to have considered the issue. *See, e.g.*, *Sharif v. Ashcroft*, 280 F.3d 786, 787 (7th Cir. 2002) ("A request for a stay of removal 'arises from' the Attorney General's decision . . . to execute a removal order."); *Garcia-Herrera v. Asher*, 585 F. App'x 439, 440 (9th Cir. 2014) (mem. op.) ("[Petitioner] challenges ICE's decision not to delay his removal pending the adjudication of his application for relief under DACA. . . . [T]his constitutes a challenge to ICE's decision to execute a removal order."); *Barrios v. Att'y Gen.*, 452 F. App'x 196, 198 (3d Cir. 2011) ("The BIA's denial of a stay of removal falls within its power to execute a removal order."); *McCloskey v. Keisler*, 248 F. App'x 915, 917 (10th Cir. 2007) ("The Government argues that we lack jurisdiction to review Ms. McCloskey's petition because the essence of her challenge is ICE's refusal to continue deferring her removal. We agree.").

F.3d 743, 746–47 (6th Cir. 2006) (footnote and citation omitted); *see also Jaber v. Gonzales*, 486 F.3d 223, 230 (6th Cir. 2007) ("The REAL ID Act of 2005 clearly eliminated a habeas petition as a means for judicial review of a removal order, abrogating any holding in *St. Cyr* to the contrary.").

Turning back to the matter at hand, the government argues that *Moussa* controls, and that the district court therefore lacked subject-matter jurisdiction over Rranxburgaj's complaint. We agree. By challenging ICE's decision to deny his request for a stay of removal, Rranxburgaj is seeking to enjoin the Attorney General from executing a valid order of removal. *Moussa* held that decision is "protected from subsequent judicial review under § 1252(g)," so the district court lacked jurisdiction over plaintiff's complaint. 389 F.3d at 554.

III.

Rranxburgaj offers several arguments for why *Moussa* does not resolve this case. They are unpersuasive.

First, he focuses on the last section of *Moussa*, arguing that he has raised a pure question of law regarding ICE's decision to disentitle him to discretionary relief, so he may avoid § 1252(g). But as we have already explained, *Moussa* relied on *St. Cyr,* which is no longer precedent.[4] We are aware of

[4] Along these same lines, Rranxburgaj's reliance on United *States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (en banc) is unpersuasive. That case also predates the REAL ID Act, and we find no support beyond *St. Cyr* for its assertion that courts have jurisdiction for "consideration of a purely legal question," which would otherwise fall within the scope of § 1252(g). *Id.* at 1155–56. To the extent that *Hovsepian* relied on *Spencer Enterprises*

no other exception to § 1252(g) that would allow for review of pure questions of law. *Cf. Hamama v. Adducci*, 912 F.3d 869, 875 (6th Cir. 2018) (holding that § 1252(g) does not violate the Suspension Clause).

Plaintiff also cites *Arce v. United States*, 899 F.3d 796 (9th Cir. 2012) (per curiam), as authority that the district court had jurisdiction to hear a legal challenge to the Attorney General's authority to execute a removal order. We find *Arce* distinguishable. There, the government's violation of a judicial stay of removal resulted in an alien's removal from the United States. *Id.* at 799. The alien plaintiff brought a Federal Tort Claims Act claim for damages suffered as result of the removal. The Ninth Circuit held that this claim fell outside the scope of § 1252(g) because "the stay of removal temporarily suspend[ed] the source of the [government's] authority to act." *Id.* at 800 (first alteration in original, internal quotation marks and citation omitted). In other words, while the stay was in place, the government "totally lack[ed] the [statutory] discretion to effectuate a removal order." *Id.* at 800–01. Therefore, the Ninth Circuit concluded that the government's "decision or action to violate a court order staying removal . . . f[ell] outside" of § 1252(g)'s "jurisdiction-stripping reach." *Id.* at 800. Here, the government violated no such order, and Rranxburgaj's challenge instead goes directly to ICE's decision to execute an order of removal. Accordingly, we are not persuaded by *Arce*

Inc. v. United States, 345 F.3d 683, 689–90 (9th Cir. 2003), for that proposition, it is contrary to our precedent. *See CDI Info. Servs., Inc. v. Reno*, 278 F.3d 616, 620 (6th Cir. 2002).

that the district court had subject-matter jurisdiction.[5]

Finally, Rranxburgaj argues that we should disregard *Moussa* either because it runs afoul of *AADC*'s narrow interpretation of § 1252(g) or because it is distinguishable. We disagree. Our court considered and applied *AADC* in *Moussa*, and we view that decision to be a faithful application of the Supreme Court's guidance. Nor is *Moussa* distinguishable; we discern no principled difference between the denial of an application for a stay of removal on the merits and a denial on procedural grounds. In either case, the decision to deny a temporary stay of removal arises directly from the decision of the Attorney General to execute a removal order, so it is rendered unreviewable by § 1252(g).

IV.

Based on the record before us, no one could dispute that Ded Rranxburgaj has made significant contributions to our society since first arriving in the United States nineteen years ago. He has raised his children here, legally worked and paid taxes, and committed no crime. Moreover, he has demonstrated admirable devotion to his wife as she fights a terrible illness. But as a court of limited jurisdiction, we adjudicate cases as Congress sees fit to authorize. In the REAL ID Act, Congress decided that, as a matter of public policy, we do not

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[5] We also observe that the Eighth Circuit came to a contrary conclusion on an identical claim in *Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017) (holding that a claim challenging the execution of a removal order, in violation of a judicial stay, fell within § 1252(g)).

have jurisdiction to decide claims that arise from the decision of the Executive Branch to execute a removal order—like the ones presented in this suit. Accordingly, whether or not we agree with ICE's decision to execute plaintiff's removal order (and deny his application to temporarily stay that order), those decisions are not reviewable by the federal courts.

The judgment of the district court is therefore affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 18-11832

DED RRANXBURGAJ, PETITIONER

v.

KRISTJEN NIELSEN, ET AL., RESPONDENTS

Filed: September 12, 2019

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS [#8]

Hon. DENISE PAGE HOOD

I. BACKGROUND

On June 8, 2018, Plaintiff Ded Rranxburgaj ("Rranxburgaj") filed a petition for the issuance of a writ of mandamus in order to compel Respondents Kristjen Nielsen ("Nielsen"), Jefferson Sessions, III ("Sessions"), Rebecca Adducci ("Adducci"), and Thomas D. Homan ("Homan") (collectively, "Respondents") to adjudicate on the merits his application for a stay of removal or deferral of removal. (Doc # 1) This matter is before the Court on Respondents' Motion to Dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to

Fed.R.Civ.P. 12(b)(1) and (6), filed on August 31, 2018. (Doc # 8) Rranxburgaj filed a Response on October 12, 2018. (Doc # 12) Respondents filed their Reply on October 26, 2018. (Doc # 13)

At the time of this hearing, Nielsen was the acting Secretary of the United States Department of Homeland Security. Nielsen was responsible for the administration and enforcement of the immigration and naturalization laws pursuant to section 402 of the Homeland Security Act of 2002, 107 Pub. L. 296, 116 Stat. 2135 (Nov. 25, 2002). Nielsen was the ultimate legal custodian of the Petitioner, and was being sued by Rranxburgaj in her official capacity.

Sessions was the Attorney General of the United States. At the time this lawsuit was filed Sessions was responsible for administering and enforcing the immigration laws pursuant to section 103 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1103(a). Rranxburgaj was suing Sessions in his official capacity to the extent that 8 U.S.C. § 1103(g) vested him with authority over the immigration laws.

Adducci is the Field Office Director of the Immigration and Customs Enforcement ("ICE") (Department of Homeland Security) office in Detroit, Michigan. Adducci oversees custody determinations made by ICE within the metropolitan Detroit and greater Michigan region. Rranxburgaj is suing Adducci in her official capacity.

Homan was the acting Director of ICE. Homan was responsible for the administration and enforcement of the immigration laws pursuant to section 402 of the Homeland Security Act of 2002,

107 Pub. L. 296, 116 Stat. 2135 (Nov. 25, 2002). Rranxburgaj is suing Homan in his official capacity.

The facts are as follows. Rranxburgaj, a native of Albania, has been on Order of Supervision since 2010. (Doc # 1, Pg ID 2, 6) He was initially a derivative beneficiary on his wife, Flora Rranxburgaj's I-589 application for asylum, withholding of removal, and CAT relief. (Doc # 1, Pg ID 3) An Immigration Judge denied this application on June 13, 2006. (*Id.*) Mrs. Rranxburgaj's appeal to the Board of Immigration Appeals was dismissed in a decision dated May 5, 2009. (*Id.*)

ICE has allowed Rranxburgaj to remain in the United States so that he could tend to his ill wife. (*Id.* at 2-3.) Mrs. Rranxburgaj has also been on Order of Supervision, along with the couple's son, who is currently a Deferred Action for Childhood Arrivals grantee. (*Id.* at 3.) ICE has not asked Mrs. Rranxburgaj to depart the United States because her medical condition prevents her from being able to travel. (*Id.*)

On or about December 8, 2017, Rranxburgaj applied for a stay of removal. (Doc # 1-1) ICE denied Rranxburgaj's stay request as moot on January 17, 2018, because on that date, Rranxburgaj failed to report to ICE as mandated by his Order of Supervision. (Doc # 1-3) Rranxburgaj's January 17, 2018 report date was his last report date prior to his scheduled deportation. (Doc # 1, Pg ID 7) Before Rranxburgaj's scheduled deportation date, he went into sanctuary at a local Detroit church out of fear that he would be detained if he reported to ICE. (*Id.*) ICE was fully informed of Rranxburgaj's whereabouts and location when he entered sanctuary. (*Id.*) Rranxburgaj and his family

currently reside in the church that he entered in January 2018. (Doc # 1, Pg ID 9)

Rranxburgaj sought reconsideration of the stay denial by letter on January 23, 2018. (Doc # 1-4) On January 24, 2018, Robert Lynch ("Lynch"), Deputy Field Office Director, verbally affirmed the denial of Rranxburgaj's reconsideration request over the phone, and alleged that Rranxburgaj is a fugitive. (Doc # 1, Pg ID 8) Rranxburgaj sought further reconsideration of ICE's verbal affirmance, and sent Lynch a follow up letter dated February 21, 2018. (Doc # 1-5) On April 20, 2018, after having received no response to this inquiry, Rranxburgaj's attorney, George P. Mann ("Mann") emailed Adducci and asked for a response. (Doc # 1-6) ICE Deputy Field Office Director, Todd Shanks called Mann on April 23, 2018, and explained that ICE's denial of Rranxburgaj's stay request would not be reversed. (Doc # 1, Pg ID 9)

Rranxburgaj now seeks from this Court a merits adjudication of his application for a stay of removal. (*Id.*) Rranxburgaj argues that he is entitled to a merits adjudication pursuant to 5 U.S.C. § 706. (*Id.* at 18.) Rranxburgaj contends that he would be successful if his stay request was adjudicated on the merits because he believes that ICE wrongly categorized him as a fugitive. (*Id.*)

II. ANALYSIS

A. Standards of Review

1. *Rule 12(b)(1)*

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). Motions under Rule 12(b)(1) fall into two

general categories: facial attacks and factual attacks. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). A facial attack challenges the pleading itself. In considering this type of attack, the court must take all material allegations in the complaint as true, and construe them in the light most favorable to the non-moving party. *Id.* Where subject matter jurisdiction is factually attacked, the plaintiff bears the burden of proving jurisdiction to survive the motion, and "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* In a factual attack of subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.*

2. *Rule 12(b)(6)*

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This type of motion tests the legal sufficiency of the plaintiff's complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A court, however, need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby Cnty.*, 220 F.3d 443, 446 (6th Cir. 2000)). "[L]egal

conclusions masquerading as factual allegations will not suffice." *Edison v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

As the Supreme Court has explained, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted); *see LULAC v. Bresdesen*, 500 F.3d 523, 527 (6th Cir. 2007). To survive dismissal, the plaintiff must offer sufficient factual allegations to make the asserted claim plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account. *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001).

B. Subject Matter Jurisdiction

Respondents argue that the Court lacks subject matter jurisdiction to adjudicate Rranxburgaj's claim. Respondents contend that since Rranxburgaj's action arises from ICE's decision to deny his application for a stay and execute his removal order, 8 U.S.C. § 1252(g) precludes the Court from ruling on Rranxburgaj's claim. Respondents also claim that the Sixth Circuit has determined that refusal to issue a stay of

deportation is a decision to execute a removal order as contemplated by § 1252(g), and therefore, in these instances, judicial review is precluded. *See Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004).

Rranxburgaj argues that the Court has subject matter jurisdiction pursuant to various statutes. First, Rranxburgaj claims that 28 U.S.C. § 1331 gives this Court subject matter jurisdiction because this case involves questions of federal law, specifically the Fugitive Disentitlement Doctrine, Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the APA, 5 U.S.C. § 551 et seq. Second, Rranxburgaj asserts that pursuant to 28 U.S.C. § 1361, this Court has subject matter jurisdiction since the Court has original jurisdiction over cases involving mandamus requests. Third, Rranxburgaj argues that the Court has subject matter jurisdiction based on 5 U.S.C. §701 because this statute allows the Court to review relevant questions of law in relation to agency actions. Fourth, Rranxburgaj contends that under 28 U.S.C. §§ 2201 and 2202, the Court has subject matter jurisdiction because it has the authority to grant Rranxburgaj declaratory relief.

Additionally, Rranxburgaj claims that § 1252(g) does not preclude this Court from ruling on his action because he alleges that his claim does not arise from ICE's "decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien." Rranxburgaj argues that instead, his claim stems from ICE's decision to declare that his application for a stay of removal was moot because of his alleged fugitive status. Rranxburgaj further contends that *Moussa* is distinguishable from the instant case since his

claim is based on a pure legal question. According to Rranxburgaj, in *Moussa*, the court denied an alien's request to review the denial of his application for a stay of removal, not whether the alien's stay of removal request should have been declared moot.

Where subject matter jurisdiction is challenged pursuant to Rules 12(b)(1) and 12(b)(6), courts must consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if it is determined that subject matter jurisdiction is lacking. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). The Court finds that here, it lacks the subject matter jurisdiction necessary to rule on Rranxburgaj's claim, and therefore, Respondents' Rule 12(b)(6) challenge is moot. The REAL ID Act of 2005 divests district courts of subject matter jurisdiction to review removal orders of any alien. 8 U.S.C. § 1252(a)(2); *Elgharib v. Napolitano*, 600 F.3d 597, 600-601 (6th Cir. 2010). Only Courts of Appeals have jurisdiction to review an Order of Removal. 8 U.S.C. § 1252(a)(5).

Rranxburgaj argues that this Court should adjudicate his case because it involves a legal question regarding whether he is a fugitive under the Fugitive Disentitlement Doctrine. While Rranxburgaj might have a legitimate legal question, this is not the proper forum to address Rranxburgaj's claim. Rranxburgaj's ultimate claim is that he "seeks a merits adjudication of his application for a stay of removal." (Doc # 1, Pg ID 9) The stay of removal is directly related to Rranxburgaj's final removal order. Since Rranxburgaj's claim pertains to a final removal

order, he must pursue his claim with the Court of Appeals. *See Elgharib*, 600 F.3d at 600-601.

III. CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Respondents' Motion to Dismiss (Doc # 8) is **GRANTED**.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice.

DATED: September 12, 2019

/s/ Denise Page Hood
DENISE PAGE HOOD
Chief Judge

APPENDIX C

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

January 17, 2018

Mr. George P. Mann
3505 West 14 Mile Rd. STE 20
Farmington Hills, MI 48331

Re: Application for a Stay of Deportation or Removal—A095855793

Dear Mr. Mann,

This letter is in response to an Application for a Stay of Deportation or Removal filed on December 8, 2017, by your office on behalf of Mr. Ded Rranxburgaj. The basis of this application is that Mr. Rranxburgaj would like to remain in the United States for a period of one year in order to continue to provide care and financial support for his wife.

The removal of individuals who are subject to a final order of removal but have not complied with their legal obligation to depart the United States is a Department of Homeland Security Enforcement Priority. On June 13, 2006, an Immigration Judge ordered your client removed from the United States. On May 5, 2009, the Board. of Immigration Appeals dismissed your client's appeal thus making the order of removal administratively final.

Your request for a stay of removal is denied, as moot, as your client failed to report as required on January 17, 2018 to the ICE-ERO Non-Detained

Office located at 260 Mt. Elliott, Detroit, MI 48207. On January 9, 2018, ICE-ERO made your client and an attorney from your office, Ms. Oana Marina, fully aware of your client's requirement to report on January 17, 2018. Your client's willful failure to comply with the terms of his supervised release have resulted in him being appropriately categorized as a fugitive from ICE.

Specific questions may be directed to Supervisory Detention and Deportation Officer Alvedy at (313) 394-2510.

Sincerely,

[signature]

Robert Lynch
Deputy Field Office Director